NOS. 82-927
82-936

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

FREDERICK C. LANGONE,
MADELINE G. SARNO, VICTOR GRILLO,
LOUIS FERRETTI, GAIL A. FASANO,
THE LANGONE FOR LIEUTENANT GOVERNOR
COMMITTEE, and FRANCIS X. BELLOTTI,

Appellants,

v.

MICHAEL J. CONNOLLY,
as he is Secretary of the Commonwealth
of Massachusetts,
DEMOCRATIC STATE COMMITTEE,
SAMUEL ROTONDI, JOHN F. KERRY,
LOIS PINES, and EVELYN MURPHY,

Appellees.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

APPELLEE DEMOCRATIC STATE COMMITTEE OF MASSACHUSETTS' MOTION TO DISMISS

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QUESTIONS PRESENTED

The questions presented by this case are the two questions that were decided by the Supreme Judicial Court of Massachusetts in the ruling below:

1. Whether all candidates who have complied with applicable statutory requirements must appear upon the Democratic state primary ballots, notwithstanding the failure to obtain at least fifteen percent of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III of the "Charter of the Democratic Party of the Commonwealth" [the "15% Rule"]? 1/

1/ Article Six, Section III of the Charter of the Democratic Party for the Commonwealth of Massachusetts (the "15% Rule"), adopted at the party's 1979 Charter Convention, provides for party endorsement of candidates through the mechanism of an election year Endorsing Convention. Endorsements are made by majority vote of the delegates present and voting. However,

2. Whether the decision by the Secretary of the Commonwealth that he will not place upon the Democratic state primary ballots those candidates who failed to obtain at least fifteen percent of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III of the "Charter of the Democratic Party of the Commonwealth", but

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1/ (continued)

candidates who, on any ballot, receive at least 15% of the votes cast at the Endorsing Convention for the office they seek and who otherwise meet the requirements of M.G.L. c.53, may challenge that endorsement at the primary election. The candidate receiving a plurality of the votes cast at the Democratic Primary becomes the Democratic nominee. M.G.L. c. 53, §2. (The text of Article Six, Section III is attached to this Motion as Appendix A).

otherwise complied with the statutory requirements to have their names placed upon the ballots violated the constitutional or statutory rights of the voters, the candidates, or their supporters?

The court below, in Langone et al. v. Secretary of the Commonwealth, et al., Massachusetts Supreme Judicial Court, in an order dated July 6, 1982, answered these questions, "no."

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INTRODUCTION

Appellants Francis X. Bellotti ("appellant Bellotti") (Case No. 82-927) and Frederick C. Langone, Madeline G. Sarno, Victor Grillo, Louis Ferretti, Gail A. Fasano and The Langone for Lieutenant Governor Committee ("the Langone appellants") (Case No. 82-936) have filed Jurisdictional Statements with this Court seeking to appeal from a final Order and Judgment of the Massachusetts Supreme Judicial Court entered on July 6 and 7, 1982. In the alternative, they ask that their Jurisdictional Statements be considered as Petitions for Certiorari.

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, appellee Democratic State Committee of Massachusetts hereby moves to dismiss both of these appeals and opposes those

Petitions. This case presents no grounds for appeal and does not warrant further argument or briefing. It concerns the peculiarities of the Massachusetts election laws which, absent the "15% Rule", would perm.c a candidate with little or no support from regular party members to run for office as the party's official nominee, and was correctly decided by the court below in accordance with applicable precedent in this Court. Whatever federal questions it presents are insubstantial, having already been decided by this Court and correctly applied below.

OPINION BELOW

As noted by appellants, the opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts supporting the Order and Judgment from which they appeal has not yet been issued by that

court. A decisional Order, however, was entered by the Supreme Judicial Court on July 6, 1982 and a Judgment in accordance with that Order was entered by the Supreme Judicial Court for Suffolk County on July 7, 1982. Both the Order and Judgment are reproduced in the appellants' Jurisdictional Statements.

A unanimous advisory opinion in a related case which discussed many of the issues later litigated in this action, was issued by the Supreme Judicial Court on April 23, 1982. Opinion of the Justices, 385 Mass. 1201 (1982). A copy of that opinion is attached hereto as Appendix B.

JURISDICTION

Appellant Bellotti and the Langone appellants are in two very different postures before this Court. Bellotti challenges the ruling of the court below

on one ground only -- that, contrary to the decision of the Supreme Judicial Court, the Massachusetts Democratic Party's "15% Rule" was and is statutorily "preempted" by the provisions of the Massachusetts General Laws governing party primaries. He does not dispute the ruling of the court below that the "15% Rule" did not infringe the Langone appellants' constitutional rights. 2/ The Langone appellants challenge both aspects of the court's ruling.

Because of the present lack of an opinion by the Supreme Judicial Court in this case, appellants speculate as to the jurisdictional basis for these appeals. However, as explained more

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2/ See Jurisdictional Statement of appellant Bellotti, p. 29, fn. 13.

fully below, it is possible that the decision of the Supreme Judicial Court, on many of the issues sought to be raised by appellants in this Court, rests on adequate and independent state statutory and constitutional grounds. To the extent it does not, it is clear that the federal questions raised by both appellants are insubstantial and were correctly decided by the court below in accordance with this Court's prior decisions upholding the associational rights of political parties and the constitutional validity of reasonable restrictions on ballot access. Thus, no jurisdictional basis for this appeal exists.

In the alternative, appellants have asked that their Jurisdictional Statements be treated as Petitions for Certiorari. For the same reasons as

articulated in support of this Motion to Dismiss, the Democratic State Committee opposes those Petitions.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the state statutory and federal Constitutional provisions cited by appellants, Articles XVI and XIX of the Declaration of Rights to the Massachusetts Constitution and M.G.L. c.52, §10, and M.G.L. c.53, §38 were also involved in the decision below and may have been dispositive of issues which appellants seek here to appeal. The pertinent text of these state constitutional and statutory provisions is set forth in Appendix C.

STATEMENT OF THE CASE

Appellee Democratic State Committee wishes to bring the following additional facts to the Court's attention.

By statute, the winner by a plurality of the Democratic primary becomes the Democratic Party nominee at the general election. M.G.L. c. 53, §2. Also by statute, voting at the Democratic primary is open not only to enrolled party members but also to unenrolled (independent) voters who declare themselves "Democrats" at the polls just before receiving ballots. M.G.L. c. 53, §7. [3/] Voters may cancel or change their party registration at the polling places immediately after voting. M.G.L. c. 53, §38. Thus, it is quite literally possible for a voter to be only a "primary day Democrat."

3/ As of February 1980, 39.9% of all registered Massachusetts voters were unenrolled. Opinion of the Justices, 385 Mass. 1201, 1205 fn. 1 (1982).

Candidates seeking to have their names placed on the Democratic primary ballot must satisfy several statutory requirements. The candidate must be an enrolled Democrat, M.G.L. c. 53, §48; file a financial disclosure form with the State Ethics Commission, M.G.L. c. 53, §9; and submit nominating papers signed by at least 10,000 registered voters who can be either Democrats or independents. M.G.L. c. 53, §§44, 46. Thus, as observed by the Supreme Judicial Court, nothing in the statutory scheme would prevent a candidate who lacked the support of a single registered Democrat from being placed on the Democratic primary ballot and, notwithstanding little or no support from the regular party membership, from potentially becoming the Democratic Party candidate in the general

election. Opinion of the Justices, 385 Mass. 1201, 1205 (1982).

Concerned with the decline of the party's organizational effectiveness and, in particular, with the fact that existing statutory law allowed a candidate who did not share the party's ideals, had no intention of furthering those ideals if elected, and had no party accountability, to run for office as the official Democratic Party nominee, the Democratic Party in 1977 appointed a commission to draft a proposed state party Charter. The Commission held many public meetings across the Commonwealth and, in the spring of 1979, submitted a proposed Charter to a specially convened Charter Convention. The delegates to the Charter Convention were elected at caucuses on March 24, 1979 conducted in

every ward and town in the Commonwealth. All registered Democrats were eligible to take part in those caucuses, and approximately 30,000 party members so participated.

Part of the Charter proposed by the Commission concerned the procedure by which the party would choose its nominees for state-wide office. Following the model so successfully used in Connecticut, the Commission recommended that party nominees for statewide office be selected by a two-pronged procedure involving convention endorsement and the primary election. This procedure was set forth in Article Six, Section III of the proposed Charter. Under Article Six, Section III, an Endorsing Convention, to be held in statewide election years, would, by majority vote, formally

endorse one candidate for each statewide office. However, the convention "endorsement" of a candidate could be challenged at the state party primary by any and all other candidates otherwise qualified under State law who, on any convention ballot, received at least 20% of the vote cast for that office. The party would thus be assured that its ultimate nominee had demonstrated at least a minimal degree of support from the regular party membership in addition to the broad appeal to all voters who consider themselves Democrats which is needed to win the primary election. At the same time, the rights of significant minorities in the party would be protected by their candidates being able to take their case directly to the primary voters through the "challenge"

procedure, thus ensuring an open and democratic choice.

The Charter Convention debated Article Six, Section III - including its proposed "20%" requirement - and, at the November 1979 continuation of the Convention, adopted the overall procedure of convention endorsement and primary selection, but struck a slightly different balance. The requirement that a candidate desiring to run in the primary obtain at least 20% of the vote for the office he sought on any ballot at the Endorsing Convention was reduced to 15% of the vote. The "15% Rule", as it came to be known, was then adopted by a roll-call vote of over two-thirds of the voting delegates. The overall Charter, as amended, was likewise adopted by an over two-thirds roll-call vote.

The Charter Convention intended the Charter - including its "15% Rule" - to take effect as soon as possible. Although the party leadership was initially unsure as to whether certain of the Charter's provisions could take effect without legislative action, the convention delegates voted on the Charter, including Article Six, Section III and its "15% Rule", fully aware that it could take effect without such legislation.

Because of legislation pending in the Massachusetts General Court during the 1981 legislative session which would have amended the State's election laws, the party leadership remained uncertain about the legal effect of the "15% Rule". However, none of that proposed legislation was enacted into law. Thus, since the previous statutory scheme

remained intact, and in light of this Court's decision in Democratic Party v. Wisconsin, 450 U.S. 107 (1981), the Democratic State Committee determined that Article Six, Section III could be implemented immediately. Accordingly, plans went ahead to hold an Endorsing Convention in 1982 pursuant to Article Six, Section III. From the outset of planning for that Endorsing Convention it was clear that the "15% Rule" would be applicable. At a public meeting in Northampton, Massachusetts on November 7, 1981 which adopted the delegate selection rules and convention rules for the planned 1982 Democratic Endorsing Convention, it was publicly announced by the Chairman of the Democratic State Committee that the decision in Democratic Party v. Wisconsin, 450

U.S. 107 (1981) could make Article Six, Section III effective without legislation. The preliminary Call to Convention, mailed by the Democratic State Committee to the Chairpersons of the various Democratic ward and town committees throughout the Commonwealth in December of 1981, accordingly contained a copy of the Charter, including Article Six, Section III and its "15% Rule", without a previous notation that certain of its provisions would require legislation to become effective.

Had appellant Langone been dissatisfied with the "15% Rule", he could have declared himself an "unenrolled" candidate and attempted to qualify for the general election ballot as an independent at any time prior to

February 4, 1982. M.G.L. c. 53, §6. Langone chose not to do so.

On February 6, 1982, delegates to the 1982 Endorsing Convention were elected at caucuses conducted in every ward and town throughout Massachusetts. Persons registered as Democrats prior to December 31, 1981 were eligible to take part in those February 6th caucuses and approximately 100,000 so participated. The Endorsing Convention was duly held on May 21-22, 1982, and candidates were endorsed for every statewide office. Five of the seven candidates for the Party's nomination for the Lieutenant Governorship received at least 15% of the convention vote on one or more ballots for that office. Only two, appellant Langone and Joel Pressman, did not. Two amendments seeking either to repeal Article Six, Section III or

postpone its effective date until January 1, 1983 were presented, debated and overwhelmingly defeated.

The Democratic primary was duly held on September 14 and the general election on November 2, 1982.

SUMMARY OF ARGUMENT

At issue in the court below was a peculiarity in the Massachusetts election laws which allows "independents" to sign party nominating petitions and vote in party primaries, and a rule, democratically adopted by the state Democratic Party in response to that peculiarity, designed to ensure that regular party members had an effective role in the selection of their party's candidate. That party rule, popularly known as the "15% Rule", was designed to fit into the state statutory

scheme for party primaries, and to protect the rights of significant minorities within the party. Plaintiffs appeal from a judgment of the Massachusetts Judicial Court upholding the validity and effect of that Rule.

Appellants' appeals should be dismissed. It is possible that many of the issues raised by them were decided by the court below on independent and adequate state grounds. To the extent they were not, the federal questions which appellants seek to reraise in this Court are insubstantial. The case below turned on a peculiarity of the Massachusetts election laws. No conflict exists between the ruling of the court below and any decision of this or other courts. No novel issues are presented requiring resolution by this

Court. To the contrary, the decision of the court below was firmly in accordance with applicable precedent in this Court and was correctly decided.

Under the first and fourteenth amendments to the United States Constitution and Articles XVI and XIX of the Declaration of Rights to the Massachusetts Constitution, the Massachusetts Democratic Party has a constitutionally protected right of association enforceable against the state. This fundamental right of association empowers the party to adopt and enforce reasonable candidate selection procedures, like the "15% Rule", which, in the democratically ascertained judgment of the party membership, will contribute to the achievement of the party's political objectives.

The Massachusetts statutes which regulate the election process are not exclusive, either by their terms or through the operation of any principles of preemption. While these statutes serve to protect the state's interest in the regularity of the election process, they do not, and constitutionally they cannot, preclude a political party from adopting, by democratic process, reasonable additional rules and requirements to be met by candidates who seek public office under the party's banner. Accordingly, a reading that M.G.L. c. 53, §44 preempts the "15% Rule" would render the statute unconstitutional under both the Massachusetts and United States Constitutions.

The constitutionally protected right of the Massachusetts Democratic

Party to choose its own candidate selection procedures may be abridged by the state only upon a showing of a compelling state interest, and then only by the least restrictive means available. No compelling state interest warranted the invalidation of the "15% Rule," which was democratically adopted by the party to enhance its organizational effectiveness, and which has the demonstrated support of the party membership.

The "15% Rule" did not infringe any constitutionally protected rights of the appellants. No one has a constitutional right to have either his name or the name of his chosen candidate placed on the ballot in a party primary. So long as all candidates have a fair opportunity to compete for the party's nomination on an equal basis, no

constitutional infirmity exists. Moreover, apart from the Democratic primary, reasonable alternative means of access to the ultimate election ballot existed and were available to appellant Langone if he was dissatisfied with the Democratic Party procedures. Reasonable alternative means of expressing their candidate preference at the final election -- either by "write in" or through support of other candidates -- existed for the voter appellants.

Finally, the "15% Rule" was properly held to have been applicable to the September 14, 1982 primary. The Democratic Party had consistently repeated its intent that the "15% Rule" be implemented as soon as possible. Although the party leadership initially felt that legislation might be necessary to implement the "15% Rule", this

Court's declaration in Democratic Party v. Wisconsin, 450 U.S. 107 (1981), led to a reassessment which was clearly made known in ample time for appellant Langone and his supporters to prepare accordingly.

ARGUMENT

I. THIS CASE CONCERNS ONLY THE VALIDITY AND EFFECT OF THE MASSACHUSETTS DEMOCRATIC PARTY'S "15% RULE" IN THE CONTEXT OF THE MASSACHUSETTS STATE STATUTORY SCHEME FOR PARTY PRIMARIES.

At issue in this case is a narrowly drawn party rule -- democratically adopted by a political party to harmonize the rights of regular party members, significant minorities within the party, and the state statutory scheme for a primary open to "independents" -- which, after full argument and briefing, was upheld by the Massachusetts Supreme Judicial Court.

Contrary to appellants' assertions, the ruling below does not spell the end of the primary system nor signify the triumph of "bossism". It addressed a peculiarity in the Massachusetts election laws which allows "independents" to sign party nominating petitions and vote in party primaries, and upheld the Democratic Party's "15% Rule" -- which was designed to ensure that regular party members had at least a minimal voice in who their party's candidate would be -- in the light of that peculiarity. The "15% Rule" did not and does not conflict with any state statute. Rather, it was and is a reasonable additional requirement designed to ensure that party interests are protected in the primary process. Contrary to appellants' contentions, the issue before the Supreme Judicial Court

was not whether a political party has the absolute right to set minimum ballot access requirements. The court below's ruling does not signify the uncritical acceptance of all such party rules. At issue was solely the "15% Rule", not a "35%" or "50%" or "100%" requirement. Nothing more was decided.

II. WHATEVER FEDERAL QUESTIONS ARE PRESENTED BY THIS APPEAL ARE INSUBSTANTIAL AND WERE CORRECTLY DECIDED BY THE COURT BELOW.

A. Article Six, Section III of the Charter of the Massachusetts Democratic Party was a Lawful Exercise of the Party's Constitutionally Protected Right of Association.

The Massachusetts Democratic Party's adoption of the "15% Rule", through a democratic process in which party members demonstrated their overwhelming support for the Rule, was a lawful exercise of the party members' constitutionally protected right of association.

The fundamental right of political parties to establish candidate selection procedures has been repeatedly recognized by this Court. Rivera-Rodriguez v. Popular Democratic Party, ___ U.S. ___, 72 L Ed.2d 628, 637-38 (1982); Democratic Party v. Wisconsin, 450 U.S. 107, 122-24 (1981); Cousins v. Wigoda, 419 U.S. 477, 491 (1975); and Ray v. Blair, 343 U.S. 214 (1952). As noted by the court below in its advisory opinion:

> "A determination of who will appear on a general election ballot as a candidate endorsed by an identified political party is a critical decision for that party. The party, therefore, has a substantial interest implicit in its freedom of association to insure that party members have an effective role in that decision."

Opinion of the Justices, 385 Mass. 1201, 1204 (1982).

This Court has previously recognized the constitutional right of a political party to protect its candidate selection process from undue influence by persons who are, at best "election day" party members or who are not party members at all. See Rivera-Rodriguez v. Popular Democratic Party, supra; Democratic Party v. Wisconsin, supra; Cousins v. Wigoda, supra; and Ray v. Blair, supra.

Appellants seek to distinguish the holdings of these cases by contending that they apply only to national parties and national political contests. That contention is simply wrong.

> "Although Cousins' holding is limited to conflicts between national party rules and state law, the decision is also relevant in resolving conflicts between state parties and state law. The balancing test employed in Cousins rests on a finding

> that the alternate delegates had an associational interest in participating in the party's activities. More ... the Court's language indicates that the party itself had an associational interest in deciding who could participate in its activities, which was infringed by the lower court's injunction. Indeed, the opinion suggests that the party's right to associate may even protect a more general right of group self-governance. There seems to be no reason to limit protection of these associational interests to national parties or to delegates to national conventions, and nothing in Cousins suggests that the Court's interpretation of the scope of the freedom to associate should not extend to state or local parties".

Developments in the Law: Elections, 88 Harv. L. Rev. 1111, 1210 (1975), cited with approval in Fahey v. Darigan, 405 F. Supp. 1386, 1395-96 (D.R.I. 1975). See also Abrams v. Reno, 452 F. Supp. 1166 (S.D. Fla. 1978) (holding that a state political

party had the constitutionally protected right to endorse a candidate running in that party's primary election, and that a state statute to the contrary was unconstitutional).

Appellants cite Smith v. Allwright, 321 U.S. 649 (1944), for the broad proposition that state political parties may never adopt enforceable rules relating to the eligibility of candidates seeking to participate in their party primaries. Appellants misstate that holding. All Smith holds is that a party may not lawfully exclude persons from its primary on the basis of race or color. It does not hold, and cannot be construed as holding, that state and local political parties have no constitutionally protectible associational interests in who their party-endorsed candidate will be.

Appellants likewise cite a variety of state court holdings, most from the 1930's and all pre-Cousins, for the proposition that state party rules cannot override state election statutes. Once again, appellants misstate those holdings. All of them, with the exception of Love v. Wilcox, 28 S.W.2d 515 (Tex. 1930), involve an explicit conflict between a party rule and a state statute (e.g. an attempt by the party to extend a state filing deadline, to require a filing fee higher than that set by statute, etc.) -- a situation not present here, where the "15% Rule" is a reasonable additional requirement speaking to a concern (the associational rights of the Democratic Party) not addressed by the Statutory scheme. The Wilcox case is inapposite as the court there noted in its decision

that it was not called upon to determine whether a political party had power, beyond statutory control, to prescribe what persons could participate as voters or candidates in its convention or primaries. Id. at 522.

More importantly, none of appellants' cases involve a party rule as critical to the party's associational rights as the "15% Rule" is to the Democratic Party here. In such cases, a state statute in explicit conflict with a reasonable party rule which is at the core of the party's associational interests would be unconstitutional. Abrams v. Reno, 452 F.Supp. 1166, 1170 (S.D. Fla. 1978).

The "15% Rule" admittedly adds a new hurdle for would-be Democratic Party candidates, whereby a place on the

primary ballot must now be earned by obtaining a measure of support from active party members, who are largely responsible for its organizational work, for the development of its platforms and in general for maintaining the party as an effective force in our political system. 4/ This is both a reasonable and lawful precondition to obtaining the right to carry the party's banner. See Ripon Society, Inc. v. National Republican Party, 525 F. 2d. 567 (D.C. Cir. 1975) (en banc), cert. denied, 424 U.S. 933 (1976). Here the means chosen by the party to effect some control over the selection of Democratic

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4/ Over 100,000 party members participated in the caucuses that selected the 3,500 delegates to the 1982 Endorsing Convention.

Party candidates, the "15% Rule", only bars from the ballot would-be candidates who have proven unable to muster even a minimal degree of support from the active party membership. 5/ Five candidates other than Pressman and appellant Langone obtained sufficient party support to stand before the primary voters as Democratic Party candidates for Lieutenant Governor. It

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5/ When imposed by state statute, such requirements have repeatedly been upheld as reasonable and lawful. See e.g., Tansley v. Grasso, 315 F. Supp. 513 (D. Conn. 1970), in which a three judge court upheld a Connecticut statutory requirement for 20% approval by party delegates at district conventions in order for candidates to qualify for the party's district primary ballot. See also Restivo v. Conservative Party, 391 F. Supp. 813 (S.D.N.Y. 1975); Clark v. Rose, 379 F. Supp. 73 (S.D.N.Y. 1974) (three-judge court), aff'd, 412 F.2d 56 (2nd Cir. 1976).

is, therefore, manifest that the "15% Rule", while serving the legitimate interest of the party in limiting its primary ballot to candidates of demonstrated allegiance, does not impair the right of Democratic primary voters to a broad and representative choice of candidates.

B. The Court Below Properly Held that the "15% Rule" was a Valid and Binding Addition to the Statutory Requirements of M.G.L. Chapter 53.

The provisions of M.G.L. c.53 are not by their terms exclusive. They set forth requirements for access to the party primary ballots, but nowhere explicitly state that they are preemptive. Indeed, M.G.L. c.52, §10 gives party State Committees the right to "make rules and regulations, consistent with law, for calling conventions."

It is possible that the court below, construing those statutory provisions, held that, as a matter of state statutory construction, those statutes did not "preempt" the right of a political party to place reasonable additional requirements for candidate eligibility on persons seeking their party's endorsement at the primary. If so, such a holding would be on an independent and adequate non-federal basis, depriving this Court of jurisdiction to review that decision. It is equally likely that the court below, construing those state statutory provisions in the light of the protections that Article XVI and XIX of the Declaration of Rights to the Massachusetts Constitution give the associational rights of political

parties, [6] held that those statutes were not pre-emptive and that the Democratic Party had the constitutionally protected right to impose the "15% Rule" on candidates seeking to participate in its primary. If so, once again that would constitute an independent and adequate non-federal basis for the decision, not reviewable in this Court.

The only way that the allegedly "pre-emptive" effect of the Massachusetts statutory scheme would properly be before this Court would be if the court below held that the statutes: (1) were facially pre-emptive; (2) did not infringe the Democratic

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6/ Article XVI protects freedom of speech; Article XIX protects the right of assembly.

Party's associational rights as protected by the Massachusetts Constitution; but (3) did violate the Massachusetts Democratic Party's first and fourteenth amendment rights of association. Even if this should be the case, it is clear that this Court should dismiss appellant's appeal because the federal question so raised would be insubstantial -- one already decided by this Court and which was decided by the court below in accordance with applicable Supreme Court precedent. See Rivera-Rodriguez v. Popular Democratic Party, ___ U.S. ___, 72 L.Ed. 2d 628 (1982); Democratic Party v. Wisconsin, 450 U.S. 107 (1981); Cousins v. Wigoda, 419 U.S.477 (1975); Ray v. Blair, 343 U.S. 214 (1952).

C. The "15% Rule" Did Not Infringe Any of the Langone Appellants' Constitutionally Protected Rights.

A candidate has no fundamental constitutional right to run in a party primary and, potentially, to become that party's nominee. Clements v. Fashing, _____ U.S. _____, 73 L.Ed 2d 508, 516 (1982); Bullock v. Carter, 405 U.S. 134, 142-43 (1972); Walker v. Yucht, 352 F. Supp. 85, 97 (D. Del. 1972) (three-judge court); Developments in the Law: Elections, 88 Harv. L. Rev. 1111, 1176 (1975). Similarly, a voter does not have the constitutional right to expect that a candidate to his liking will be on the ballot. Lubin v. Panish, 415 U.S. 709, 716 (1974); Walker v. Yucht, supra at 92.

Both the state and political parties may constitutionally put reasonable restrictions upon access to

primary ballots and, so long as all candidates are equally subject to those requirements and have an equal opportunity to meet them, no constitutional rights of the candidates or their supporters are infringed. Clements v. Fashing, ___ U.S. ___, 73 L.Ed 2d 508, 516-17 (1982) (inquiry is whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity). See generally Developments in the Law: Elections, 88 Harv. L. Rev. 1111, 1176-77 (1975).

The "15% Rule" has, at most, a constitutionally insignificant impact on the Langone appellants' constitutional rights. It does not discriminate against a discrete minority group. It does not involve a classification based on wealth. Nor does it impose a burden

on new or small political parties or independent candidates. Thus, it is not subject to "strict scrutiny", and need only bear a rational relationship to a legitimate party goal. Clements v. Fashing, _____ U.S. _____, 73 L.Ed. 2d 508, 516-517 (1982); Clough v. Guzzi, 416 F. Supp. 1053, 1066-68 (D. Mass. 1976) (three-judge court); Nader v. Schaffer, 417 F. Supp. 837, 948-49 (D. Conn. 1976) (three-judge court) aff'd 429 U.S. 989 (1976); Walker v. Yucht, 352 F. Supp. 85 (D. Del. 1972) (three-judge court). This it clearly does. 7/

7/ The "15% Rule", in fact, serves a compelling party interest (that of assuring its members an effective role in the selection of their party's nominee) and is thus constitutionally permissible even under the "strict scrutiny" standard of review. See Storer v. Brown, 415 U.S. 724 (1974).

Candidate qualifications far more restrictive than those imposed by the "15% Rule" have been upheld against constitutional challenge many times, the closest case being Tansley v. Grasso, 315 F. Supp. 513 (D. Conn. 1970) (three-judge court) in which the constitutional validity of Connecticut's statutory requirement that a prospective candidate receive the support of at least twenty percent of the delegate vote in a party convention, on any roll-call vote, in order to qualify to run in the party primary, was unanimously upheld by the court. See also Storer v. Brown, 415 U.S. 724 (1974) holding, inter alia, that a state's requirement that independent candidates gather 325,000 signatures of registered voters in 24 days in order to qualify for the ballot as a presidential or vice

presidential candidate was not unconstitutional; Jenness v. Fortson, 403 U.S. 431 (1971) (state's requirement that independent candidates file a nominating petition signed by at least 5% of the number of registered voters who participated in the last general election for the office in question held valid against constitutional attack); and Rosario v. Rockefeller, 410 U.S. 752 (1973) (cutoff date for enrollment which occurs about eight months before a presidential, and 11 months before a nonpresidential, primary, was not unconstitutionally arbitrary when viewed in light of legitimate state purpose of avoiding disruptive party raiding).

Political parties have interests parallel to those of the states, and reasonable means employed by them in furtherance of those interests which, if

used by the state would be constitutionally permissible, are likewise constitutional. Thus, in Restivo v. Conservative Party, 391 F. Supp. 813 (S.D.N.Y. 1975), and Clark v. Rose, 379 F. Supp. 73 (S.D.N.Y. 1974) (three-judge court), aff'd, 531 F.2d 56 (2nd Cir. 1976), the courts upheld a party rule that required party non-members to secure twenty-five percent of the vote of the party's state committee before being allowed to participate in the primary. Indeed, a political party's regulation of ballot access is accorded far more deference than that of a state. As noted by the court in Ripon Society, Inc. v. National Republican Party, 525 F.2d 567 (D.C. Cir. 1975) (en banc), cert. denied 424 U.S. 933 (1976):

> "The [party's] primary purpose is to chart a course for the advancement of the party's ideals and it is in that light that the requirements of equal protection are to be discerned."

525 F.2d at 585, n.58. See also Bode v. National Democratic Party, 452 F.2d 1302 (D.C. Cir. 1971) cert. denied 404 U.S. 1019 (1972); Moritt v. Rockefeller, 346 F. Supp. 34, 38 (S.D.N.Y. 1972) (three-judge court), aff'd 409 U.S. 1020 (1972).

As noted above, five of the seven candidates who submitted their names to the convention for the office of lieutenant governor received sufficient votes to qualify for the primary. Thus, the reasonableness of the "15% Rule", and the minimal nature of its requirements, are manifest.

Finally, when evaluating the Langone appellants' constitutional claims, it is important to remember that

ways other than the Democratic Party nomination exist for a candidate to get his name on the ultimate election ballot. Appellant Langone had the opportunity at any time up until February 4, 1982 to withdraw from the Democratic Party, declare himself an independent candidate, and enlist his supporters in an attempt to secure sufficient signatures on petitions to qualify for the November ballot. M.G.L. c.53, §6. He chose to remain a Democrat. Langone's supporters retained the right to "write in" Langone's name on the November election ballot, and to support other candidates who reflected their political views.

At root, under the guise of alleged "constitutional violations", the Langone appellants are asking this Court to order the Democratic Party potentially

to endorse a candidate who has not satisfied the party rules and has now chosen to challenge the wishes of a majority of its regular party members. If there are constitutional rights severely at risk, they are those of the regular Democratic Party members who, should this Court invalidate the "15% Rule", may potentially be represented in a general election by a candidate who has no significant support in the active party membership. Langone chose to stay in the Democratic Party rather than become an independent. Having made that choice, he should be required to abide by the "15% Rule."

D. Langone Was Not Prejudicially Mislead as to the Applicability of the "15% Rule" to the September 14, 1982 Democratic Party Primary.

In his Jurisdictional Statement, appellant Langone claims that, even if

the "15% Rule" is held to be valid and enforceable, it nonetheless should not have been applied to exclude him from the September 14, 1982 Democratic primary ballot. In support of this claim, he alleges that he was prejudicially mislead as to whether or not the "15% Rule" would be applied last September. The answer to this claim is simple; the Democratic State Committee's December, 1981 mailing of the preliminary "Call to Convention" included a full copy of the Charter, including Article Six, Section III, and plainly stated that it would be in effect at the upcoming Endorsing Convention. All interested candidates participated in the drafting of the Convention's rules and were informed of the Chairman's remarks about the applicability of the "15% Rule" in early

November 1981. Moreover, each candidate who wanted his name placed before that Convention, including Langone, was separately mailed a form inquiring as to whether he supported the Charter and the platform. If he had wished, at any time prior to February 4, 1982, Langone could have sought access to the November ballot as an independent. He chose to remain a Democrat, actively participated in the Endorsing Convention, and was unable to garner the minimally necessary support.

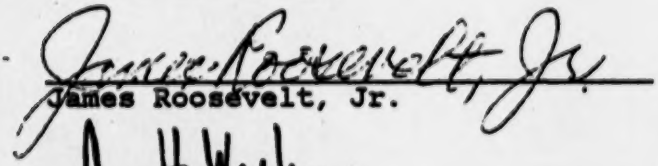
Finally, the Democratic Party, speaking through its 1982 Endorsing Convention, voted to apply the "15% Rule" at the September 14, 1982 primary. That choice was upheld by the Massachusetts Supreme Judicial Court, and that ruling should not be disturbed by this Court.

CONCLUSION

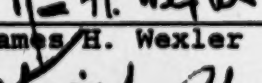
For the foregoing reasons, appellee Democratic State Committee of Massachusetts respectfully requests that the appellants' appeals be dismissed or, in the alternative, their Petitions denied.

THE DEMOCRATIC STATE COMMITTEE OF MASSACHUSETTS

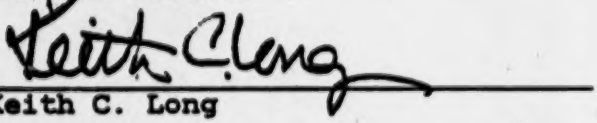
By its attorneys,



James Roosevelt, Jr.



James H. Wexler



Keith C. Long

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Dated: January 3, 1983

APPENDIX A

CHARTER OF THE DEMOCATIC PARTY OF
THE COMMONWEALTH OF MASSACHUSETTS

ARTICLE SIX, SECTION III. ENDORSING CONVENTION

There shall be a State Convention in even-numbered years for the purpose of endorsing candidates for statewide offices in those years in which such office is to be filled. Endorsements for statewide office of enrolled Democrats nominated at the Convention shall be by majority vote of the delegates present and voting, with the proviso that any nominee who receives at least 15 percent of the Convention vote on any ballot for a particular office may challenge the Convention endorsement in a State Primary Election.

OPINION OF THE JUSTICES.

Opinion of the Justices to the Governor.

Constitutional Law, Freedom of association, Political party, Primary, Opinions of the Justices. *Elections*, Political party, Primary. *Primary*. *Supreme Judicial Court*, Opinions of the Justices.

The Justices asked to be excused from answering a question propounded to them by the Governor inquiring only about the legal effect of a current statute in light of the Democratic party charter, and not about the Governor's power or authority to take certain action. [ ]

Proposed legislation which would allow a candidate to be placed on the Democratic State primary ballot by nomination papers without having received fifteen percent of the vote at the party convention would abridge the constitutional rights of the Democratic party and its members to associate by allowing candidates to be placed on the primary ballot in contravention of the party's charter. [ ]

On April 23, 1982, the Justices submitted the following answers to questions propounded to them by the Governor.

To His Excellency, the Governor of the Commonwealth of Massachusetts:

The Justices of the Supreme Judicial Court respectfully respond to the questions set forth in the Governor's request dated April 5, 1982, and transmitted to the Justices on April 6, 1982.

General Laws c. 53, § 44, as amended through St. 1981, c. 278, § 1, provides in part that "[t]he nomination of candidates for nomination at State primaries shall be by nomination papers." There is pending before the Governor for his approval House Bill No. 5852, which would amend c. 53,

§ 44, by inserting after the first sentence the following sentence: "Notwithstanding the charter, rule or by-law of a political party, any candidate, who is enrolled in such political party, submitting nomination papers subject to the provisions of this chapter shall be a candidate for nomination at the state primary." Article Six, Section III, of the charter of the Democratic party of the Commonwealth of Massachusetts, provides "There shall be a State Convention in even-numbered years for the purpose of endorsing candidates for statewide offices in those years in which such office is to be filled. Endorsements for statewide office of enrolled Democrats nominated at the Convention shall be by majority vote of the delegates present and voting, with the proviso that any nominee who receives at least 15 percent of the Convention vote on any ballot for a particular office may challenge the Convention endorsement in a State Primary Election."

Stating his uncertainty "as to the necessity or constitutionality of H. 5852 if enacted into law," the Governor requests, pursuant to the authority contained in Pt. II, c. 3, art. 2, of the Massachusetts Constitution, as amended by art. 85 of the Articles of Amendment, the opinion of this court on the following questions of law:

> "1. Does the fifteen percent rule in the Democratic Charter supersede the current provisions of General Law, Chapter 53, section 44, or can a candidate be placed on the Democratic State Primary Ballot by nomination papers without having received fifteen percent of the vote at the party convention?
>
> "2. Would enactment of H. 5852 allow a candidate to be placed on the Democratic State Primary Ballot by nomination papers without having received fifteen percent of the vote at the party convention?"

The constitutional provision which empowers us to answer questions propounded by the Governor, the Council, and the Legislature, restricts our authority to "important

questions of law" and to "solemn occasions." Part II, c. 1, § 1, art. 2 of the Massachusetts Constitution. To preserve the principle of separation of powers, fundamental in our system of government, we are bound strictly to observe these constitutional limitations. *Answer of the Justices*, 362 Mass. 914, 916-917 (1973). As the Justices have advised, "By a solemn occasion the Constitution means some serious and unusual exigency. It has been held to be such an exigency when the Governor or either branch of the Legislature, having some action in view, has serious doubts as to their power and authority to take such action, under the Constitution, or under existing statutes." *Answer of the Justices*, 373 Mass. 867, 871 (1977), quoting from *Answer of the Justices*, 148 Mass. 623, 625-626 (1889).

Because question number 1 inquires only about the legal effect of the current statute in light of the Democratic party charter, and not about the Governor's authority to take action, there is no solemn occasion authorizing us to answer. *Opinion of the Justices*, Mass. Adv. Sh. (1981) 1361, 1381-1382. It may well be that the Justices' answer to question number 1 would help the Governor determine the "necessity" of House No. 5852 in view of the present statute, a concern expressed in the request. However, whether the bill is necessary raises the question whether it is wise or expedient for the Governor to approve the bill. The Justices are not empowered to answer questions bearing on the wisdom or expediency of proposed legislation. *Answer of the Justices*, 319 Mass. 731, 734 (1946). *Opinion of the Justices*, 314 Mass. 767, 771-772 (1943). Not having the authority to answer question number 1, we respectfully request that we be excused from answering it.

In the context of the Governor's expressed uncertainty as to the constitutionality of House No. 5852, we interpret question number 2 to inquire whether, if House No. 5852 were approved, G. L. c. 53, § 44, as thereby amended, would abridge the constitutional rights of the Democratic party and its members to associate by allowing candidates to be placed on the Democratic State primary ballot in con-

travention of the party's charter. The Governor has a present duty to act on House No. 5852. Part II, c. 1, § 1, art. 2, of the Massachusetts Constitution. This duty, and the Governor's expressed doubts about whether House No. 5852 would be constitutional if he approved it, present a solemn occasion requiring our answer to the second question. See *Opinion of the Justices*, 314 Mass. 767, 772 (1943).

"The [Democratic Party of the Commonwealth] and its adherents enjoy a constitutionally protected right of political association. 'There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of "orderly group activity" protected by the First and Fourteenth Amendments. . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom.' *Kusper* v. *Pontikes*, 414 U.S. 51, 56-57 (1973). 'And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States.' *Williams* v. *Rhodes*, 393 U.S. 23, 30-31 (1968). Moreover, '[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.' *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957); see *NAACP* v. *Button*, 371 U.S. 415, 431 (1963)." *Cousins* v. *Wigoda*, 419 U.S. 477, 487-488 (1975). "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." *Democratic Party of U.S.* v. *Wisconsin*, 450 U.S. 107, 122 n.22 (1981), quoting L. Tribe, American Constitutional Law 791 (1978). A determination of who will appear on a general election ballot as the candidate endorsed by an identified political party is a critical decision for that party. The party, therefore, has a substantial interest, implicit in its freedom of association, to ensure that party members have an effective role in that decision. *Democratic Party of U.S.* v. *Wisconsin*, *supra*.

Within the Commonwealth, the winner by a plurality of a party primary becomes that party's candidate for statewide office in the general election. G. L. c. 53, § 2. Voting in party primaries is limited to enrolled party members and *unenrolled* voters who enroll at the polls just before receiving ballots. G. L. c. 53, § 37. Apart from Article Six, section III, of the State Democratic party charter, in order to be placed on a party's primary election ballot, a candidate for statewide office must be an enrolled member of that party, G. L. c. 53, § 48, and submit nominating papers signed by at least 10,000 registered voters, c. 53, § 44, who may be enrolled in that party or *unenrolled*. G. L. c. 53, § 46. Therefore, apart from Article Six, section III, of the State Democratic party charter, a candidate for statewide election could be placed on the Democratic party ballot and win the primary, thus becoming entitled to be placed on the general election ballot as the Democratic party candidate, with little or no support from the regular party membership.[1]

The State Democratic party charter, Article Six, Section III, proviso that any nominee who receives at least 15% of the vote at the State convention may challenge the convention endorsement, by negative implication adds to the statutory requirement of nomination papers for placement on the primary ballot the further requirement that a candidate must receive at least fifteen percent of the convention vote. This has the double effect of limiting the number of candidates on the primary ballot, thereby eliminating the confusion that may result from too many candidates, and of limiting the candidates to those with significant party support, thereby giving the party members an effective role in choosing the party's candidate in the general election. The State has been held to have a compelling interest in limiting the number of candidates in order to prevent voter confusion. *American Party of Texas* v. *White*, 415 U.S. 767,

[1] As of February, 1980, 38.9% of all registered voters in the Commonwealth were unenrolled. *Bachrach* v. *Secretary of the Commonwealth*, Mass. Adv. Sh. (1981) 93, 97.

780-781 (1974). *Storer* v. *Brown*, 415 U.S. 724, 732 (1974). A political party has a parallel interest.

If House No. 5852 were approved, G. L. c. 53, § 44, as thereby amended, would appear to override the charter requirement of 15% of the convention vote for placement on the primary ballot and, together with c. 53, § 48, would eliminate the Democratic party's control of who its candidate in the general election would be. This would substantially infringe the right of freedom of association of the Democratic party and its members, and therefore, to pass constitutional muster, it must serve a compelling State interest, *Sears* v. *Secretary of the Commonwealth*, 369 Mass. 392, 397 (1975), and do so with as little infringement on constitutional rights as possible. *See Riddell* v. *National Democratic Party*, 508 F.2d 770, 776-778 (5th Cir. 1975). We must apply "strict scrutiny" to its justification and operation. *Bachrach* v. *Secretary of the Commonwealth*, Mass. Adv. Sh. (1981) 93, 101.

The Commonwealth unquestionably has a compelling interest in the overall regularity of the election process, including limitation of the number of candidates on the ballot so as to avoid voter confusion and ensuring that the candidates whose names appear on the ballot have significant community support. *American Party of Texas* v. *White*, 415 U.S. 767, 782 (1974). This applies to the conduct of primary elections, *Kusper* v. *Pontikes*, 414 U.S. 51 (1973), *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973), which are an important part of the procedure by which the ultimate office holder is chosen. *Sears* v. *Secretary of the Commonwealth*, *supra* at 398. These interests are served by the requirement that each candidate for statewide office obtain the signatures of at least 10,000 registered voters on nomination papers, G. L. c. 53, § 44, but they are not served by the elimination of a 15% convention vote requirement for placement on the primary ballot. Elimination of the Democratic party charter requirement could only increase the number of candidates on the primary ballot, with a resulting increased potential for voter confusion.

We assume that House No. 5852 was designed to promote the integrity of the election process. Nevertheless, the Commonwealth's compelling interest in the integrity of the election process does not constitutionally justify elimination of party control over who the party's candidate in the general election will be. This view finds support in *Democratic Party of U.S.* v. *Wisconsin*, *supra*. In that case, the United States Supreme Court struck down a State statute that compelled the party to seat delegates at its national convention who were bound by the statute to vote on the first ballot with the results of a primary election in which any registered voter could participate regardless of party affiliation. This was contrary to the national party rules. Wisconsin impermissibly attempted to override the national party's attempt to limit "those who could participate in the processes leading to the selection of delegates to their National Convention." *Id.* at 122. General Laws c. 53, § 44, as it would be amended by House No. 5852, would attempt to override the State Democratic party's effort to ensure that regular party members have a substantial voice in the selection of its candidates for statewide office, and that, at least in conjunction with §§ 44, 46, and 37 of G. L. c. 53, is impermissible. If the law of the Commonwealth were to require that nomination papers be signed only by regular members of the party, contrary to c. 53, § 46, or that only regular members of the party may vote in the primary, contrary to c. 53, § 37, then c. 53, § 44, as it would be amended by House No. 5852, would be less intrusive on a political party's constitutional rights. However, we express no opinion on whether it would be sufficiently less intrusive to be constitutionally sound, since that is not the question before us, nor need we consider whether any proviso of the Constitution of the Commonwealth might prohibit the proposed enactment.

We answer question number 2, as interpreted by us above, as follows: If House No. 5852 were approved, G. L. c. 53, § 44, as thereby amended, would abridge the constitutional rights of the Democratic party and its members

to associate by allowing candidates to be placed on the Democratic State primary ballot in contravention of the party's charter.

The foregoing opinion is submitted by the Chief Justice and the Associate Justices subscribing hereto on the 23rd day of April, 1982.

Edward F. Hennessey
Herbert P. Wilkins
Paul J. Liacos
Ruth I. Abrams
Joseph R. Nolan
Neil L. Lynch
Francis P. O'Connor

APPENDIX C

Art. XVI. Liberty of the press; free speech

ART. XVI. The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth. The right of free speech shall not be abridged.

Art. XIX. Right of people to assemble peaceably, to instruct representatives and to petition legislature

ART. XIX. The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.

M.G.L.A.
52 §9

§10. Rules and regulations

A state, city or town committee may make rules and regulations consistent with law, for its proceedings, and a state committee may make rules and regulations, consistent with law, for calling conventions.

Added by St.1938, c. 346, §1.

M.G.L.A.
53 §38

§38. Party designation of voters and eligibility to vote under party enrolments; certificate

No voter enrolled under this section or section thirty-seven shall be allowed to receive the ballot of any political party except that with which he is so enrolled; but, except as otherwise provided by said section thirty-seven, a voter may, except within a period beginning at ten o'clock in the evening of the twenty-eighth day prior to a state or presidential primary or the twentieth day prior to a special state primary or city or town primary and ending with the day of such primary, establish, change or cancel his enrolment by forwarding to the board of registrars of voters a certificate signed by such voter under the pains and penalties of perjury, requesting to have his enrolment established with a party, changed to another party, or cancelled, or by appearing in person before a member of said board and requesting in writing that his enrolment be so established, changed or cancelled. The processing of an absentee ballot to be used at a primary shall also be deemed to establish the enrolment of a voter in a political party, effective as of the date of said processing. Except as otherwise provided in section twelve of chapter four, such enrolment, change or cancellation shall take effect at the expiration of twenty-eight days for a state and presidential primary or twenty

days for a special state primary or city or town primary following the receipt by said board of such certificate, or such appearance, as the case may be. No voter enrolled as a member of one political party shall be allowed to receive the ballot of any other political party, upon a claim by him of erroneous enrolment, except upon a certificate of such error from the registrars, which shall be presented to the presiding officer of the primary and shall be attached to, and considered a part of the voting list and returned and preserved therewith; but the political party enrolment of a voter shall not preclude him from receiving at a city or town primary the ballot of any municipal party, though in no one primary shall he receive more than one party ballot.

At primaries the city or town clerk shall make available within the polling place, certificates to enable a voter to establish, change or cancel his party enrolment, substantially as follows:

Date.....

Name..... Address.....
(print)

I hereby request that my enrolment be
(changed) as.....,
(cancelled)
(established)

in accordance with section thirty-eight of chapter fifty-three of the General Laws.

Signed under the penalties
of perjury:

.....
Signature

On the same day as he casts his ballot, the voter may transmit the certificate to the city or town clerk, who shall transmit them as soon as possible after the primary to the board of registrars, to be retained in their custody. The party enrolment of each voter shall be recorded in the current annual register of voters, and whenever a voter shall establish, cancel or change his enrolment it shall likewise be so recorded.

Said board shall forthwith notify each voter transmitting any such certificate that the same has been received and that his enrolment has been established, changed or cancelled in accordance with his request or that said certificate is void and of no effect, if such be the case.

Amended by St.1938, c. 299; St.1943, c. 334, §15; St.1945, c. 237, §3; St.1959, c. 74; St.1963, c. 113, §2; St.1967, c. 238, §2; St.1969, c. 119, §2; St.1971, c. 920, §5; St.1972, c. 115; St.1974, c. 79, §§1, 2.